## IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS SHERMAN DIVISION

GIBSON, INC.,	§	
	§	
Plaintiff,	§	
	§	
V.	§	Civil Action No. 4:19-cv-00358-ALM
	§	
ARMADILLO DISTRIBUTION	§	
ENTERPRISES, INC. and	§	
CONCORDIA INVESTMENT	§	
PARTNERS, LLC,	§	
	§	
Defendants.	§	

## <u>DEFENDANTS' RESPONSE TO PLAINTIFF GIBSON, INC.'S TRIAL BRIEF</u> REGARDING THE TIMING BY WHICH THE JURY MEASURES GENERICNESS

Gibson's entire argument relies on the assumption that the Fifth Circuit deleted a single sentence from its Revised Opinion intentionally and, according to Gibson, in Gibson's favor. Gibson's assumption is baseless. Indeed, in support of its assumption, Gibson merely reurges the same arguments Gibson presented in its unsuccessful request for rehearing. To be clear, Gibson's request for rehearing was denied. *See Gibson, Inc. v. Armadillo Distribution Enters.*, 107 F.4th 441 (5th Cir. 2024).

It is equally, if not more, plausible that the Fifth Circuit did not include the subject sentence in its Revised Opinion because that sentence was not central to the Fifth Circuit's holdings related to the Court's evidentiary rulings.

In any event, the law is clear: if Defendants prove a mark is generic at **any time**, Gibson's trademark should be cancelled. Any other conclusion would be contrary to public policy. "The harm in affording protection to a generic term is the same whether the mark became

generic or whether the term was always generic." *See, e.g., Tex. Tamale Co. v. CPUSA2, LLC*, No. 4:21-cv-3341, 2024 U.S. Dist. LEXIS 44989, at \*16-19 (S.D. Tex. Mar. 14, 2024).

DATED: March 6, 2025 Respectfully submitted,

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ATTORNEYS FOR DEFENDANTS ARMADILLO DISTRIBUTION ENTERPRISES, INC. AND CONCORDIA INVESTMENT PARTNERS, LLC

## **CERTIFICATE OF SERVICE**

I certify that a true and correct copy of the foregoing document was served on all counsel of record via the Court's CM/ECF electronic filing system on March 6, 2025.

/s/ Jerry R. Selinger
Jerry Selinger